Supreme Court, U.S.
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In The

Supreme Court of the United States

HINAL A. PATEL,

Petitioner,

v.

ATTORNEY GENERAL ERIC H. HOLDER, JR.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Immigration and Nationality Act ("INA") provides for relief from removal proceedings against illegal immigrants fleeing a country of persecution if the alien establishes that he or she is a "refugee" within the statutory definition. As part of this process, the purported refugee's identity must be checked against applicable databases of the United States Government, and the applicant must establish positive credibility. A frivolous-application-finding against such refugee forever bars an alien from any relief under the INA. The questions presented are:

1. Whether the identity requirement within the INA, as applied to thousands of asylum applicants each year within the United States, imposes a separate evidentiary requirement on the applicant for purposes of a credibility finding in support of relief applications from removal proceedings.

2. Whether a negative credibility finding, based on inconsistencies in the record and lack of identity, can support a frivolous-application finding and resultant permanent bar of relief.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

HINAL A. PATEL ("Petitioner" or "Mr. Patel") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The United States Court of Appeals for the Ninth Circuit dismissed the preceding petition for direct review on July 19. 2010. *See* Appendix[1] at 1-4. On February 25, 2005, the Board of Immigration Appeals ("BIA" or "Board") in the United States Department of Justice's Executive Office of Immigration Review (APPX. at 5), affirmed, without opinion, the decision of the Immigration Judge (APPX. at 6-28) originally entered on September 22, 2003.

JURISDICTION

As stated above, the Court of Appeals entered its final judgment for docket number 05-71627 on July 19, 2010 in an unreported decision and order. APPX. at 1-4. The preceding petition for review invoked the

[1] "Appendix" will hereinafter be referred to as "APPX."

jurisdiction[2] of the Court of Appeals under 8 U.S.C. § 1252, *as amended by* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009, *as amended by* Pub. L. No. 104-302, 110 Stat. 3656 (Oct. 11, 1996) *and by* Nicaraguan Adjustment and Central American Relief Act ("NACARA"), Pub. L. No. 105-100, § 203, 111 Stat. 2160 (Nov. 19, 1997), and the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214. The instant petition for writ of certiorari therefore invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Under 8 U.S.C. § 1158(b)(1), Immigration and Nationality Act ("INA") section 208, the Attorney General may grant asylum to any applicant who qualifies under the statutory definition of a "refugee." The INA defines a "refugee" as:

> any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually

[2] Although the Ninth Circuit rendered its decision on July 19, 2010, the prior petition was filed *before* The REAL ID Act of 2005, § 106(a), Pub. L. No. 109-13, Div. B, 119 Stat. 231 (May 11, 2005) as it amended the 8 U.S.C. § 1252. Therefore, the heightened evidentiary standards that accompany petitions governed by The REAL ID Act do not apply in the present case.

> resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

INS v. Cardoza-Fonseca, 480 U.S. 421, 428 (1987) (*quoting* 8 U.S.C. § 1101(a)(42)(A), INA § 101(a)(42)(A)); *see also* 8 C.F.R. § 1208.13.

In connection, 8 U.S.C. § 1158(d)(5)(A), INA § (d)(5)(A), provides:

> asylum cannot be granted until the identity of the applicant has been checked against all appropriate records or databases maintained by the Attorney General and by the Secretary of State, including the Automated Visa Lookout System, to determine any grounds on which the alien may be inadmissible to or deportable from the United States, or ineligible to apply for or be granted asylum.

For asylum applications filed on or after April 1, 1997, the frivolous asylum application bar under 8 U.S.C. § 1158(d)(6) renders an applicant permanently ineligible for immigration benefits if his or her asylum application is found to be knowingly frivolous. *See Kalilu v. Mukasey*, 516 F.3d 777, 779 (9th Cir. 2008). An application is frivolous "if any of its material elements is deliberately fabricated." 8 C.F.R. § 1208.20.

STATEMENT OF THE CASE

The INA, as amended by IIRIRA and AEDPA, provides illegal aliens relief from removal when the alien can prove he or she is a "refugee" within the applicable statutory definition. In conjunction with this application process, the INA reads the alien-applicant: must have his or her identity checked against applicable United States Government databases, provide credible testimony in support of such application, and not submit a frivolous application or otherwise face a permanent bar to relief from removal. These factors are routinely considered in thousands of asylum applications each year and thereby affect a multitude of immigrants on a repeated basis.

A. PETITIONER'S PERSONAL AND IMMIGRATION HISTORY

Petitioner is a native and citizen of India from the province of Gujarat. APPX. at 31-32. Prior to his flight to the United States in 1996 described below, Petitioner was an active member in the youth wing of the Bharatiya Janata Party ("BJP"), a prominent political party in his native India. APPX. at 31-34. Petitioner was mainly responsible for organizing political rallies in his capacity with the BJP. APPX. at 33. Apparently, there existed a political figure (Mr. Shankar Singh Vaghella) running in the 1996 local elections for Gujarat whom had the support of the BJP, and hence Petitioner. APPX. at 34, 36.

Subsequent to a successful election for Mr. Vaghella, he switched sides to a rival political faction ("The Congress party"). APPX. at 35-36.

As Petitioner had in good faith thrown the support of BJP behind Mr. Vaghella prior to the election to then only be betrayed by a corrupt politician, Petitioner subsequently organized a rally against him with the support of the BJP. APPX. at 36-41. Petitioner was then arrested at the behest of The Congress party as a result, and during his time in custody, endured a series of beatings which required medical attention. APPX. at 41, 44. During his time in custody, Petitioner's life and liberty was threatened.

Subsequent to his release from custody in India, Petitioner then fled initially to the United Kingdom. Petitioner entered the United Kingdom ("UK") on a passport under a different name, Abdullah Bodhaniya. APPX. at 42. When Petitioner attempted to leave the UK for the United States in 1996 for the first time, he was taken into custody by local authorities for the use of the false passport. APPX. at 42-46. After his release from British authorities, Petitioner thereafter fled to the United States entering through Los Angeles in December 1996 with the visa waiver program. APPX. at 42-46.

B. PROCEEDINGS BELOW

The Government served Petitioner with his respective charging document (Notice to Appear or "NTA") on February 11, 1998 whereby the Government

charged him removable from the United States pursuant to 8 U.S.C. § 1182(a)(6)(A)(i), INA § 212(a)(6)(A)(i) as an alien present in the United States without inspection or permission. Petitioner conceded removability, and as relief therefrom, applied for asylum under 8 U.S.C. § 1158, INA § 208(b)(1), withholding of deportation under 8 U.S.C. § 1231(b)(3), INA § 241(b)(3), and protection under Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT") as implemented by 8 C.F.R. § 1208.16 to 1208.18 (*see also* Foreign Affairs Reform and Restructuring Act ("FARRA"), Pub. L. No. 105-277, Div. G, Title XXII, 112 Stat. 2681-822 [codified as Note to 8 U.S.C. § 1231])

In proceedings before the Immigration Judge ("IJ") conducted in San Diego, California, Petitioner dutifully complied with his pre-trial-federal-fingerprint-requirements that were presumably checked against any and all relevant federal Government databases. APPX. at 29-30. The Government conceded these checks were completed and Petitioner had in fact passed. APPX. at 29-30. Petitioner truthfully testified as to his correct name and origins. APPX. at 31. Petitioner revealed that he previously attempted entry into the United States under a different name and resultantly spent time in custody for such actions in the UK. APPX. at 42-46. However, he was unsure as to the exact nature of the proceedings in the UK. APPX. at 42-46. During the course of proceedings, the Government produced an

unauthenticated INTERPOL document purportedly reflecting on such incident. APPX. at 49-50.

Petitioner then proceeded to detail his basis for asylum as described above. The IJ determined that based on the INTERPOL document, Petitioner was under a heightened, and hence additional, evidentiary burden to prove his identity for asylum purposes. APPX. at 12. The IJ found that Petitioner did not meet this burden based on his inability to provide exact details of his arrest in the UK. APPX. at 15-18. The IJ further determined that based on several apparent discrepancies between the documentary record and Petitioner's testimony, Petitioner presented a frivolous application which ultimately forever barred him for relief under the INA. APPX. at 18-24. On initial appeal, the Board affirmed the holding of the IJ without a formal opinion. APPX. at 5.

On the most recent appeal before the Ninth Circuit Court of Appeals, the court upheld the ruling of the IJ imposing a clear additional evidentiary burden in support of the aforementioned relief applications. APPX. at 2. This was despite the court's controlling holding in *Kalouma v. Gonzales*, 512 F.3d 1073, 1078-79 (9th Cir. 2008) whereby the court determined the identity requirement accompanying asylum applications is a Government-based requirement and cannot be a separate evidentiary requirement. The Ninth Circuit further affirmed the frivolous-asylum-finding based on the purported discrepancies.

REASONS FOR GRANTING THE PETITION

I. THE NINTH CIRCUIT HAS UPHELD AN EVIDENTIARY STANDARD IN ASYLUM PROCEEDINGS THAT IS BOTH INHERENTLY CONFLICTING AND AGAINST THE PLAIN MEANING OF THE IMMIGRATION AND NATIONALITY ACT.

It is a well-accepted fact the Ninth Circuit, home to such high immigrant-population states as Arizona and California, is clearly a federal appeals court on the forefront of the administration and application of immigration law. Every year thousands of immigrants seek relief from removal proceedings through varying provisions of the INA, and hence the chance to reside lawfully in the United States. As such, it can be reasonably asserted correct and consistent jurisprudence within this circuit is of paramount national importance to an ever-increasing segment of the population within the United States.

As one of the oldest forms of relief, the INA specifically provides for such a basis for relief from removal for refugees seeking asylum from foreign countries. As a preliminary requirement for such relief process, the INA requires an alien's identity to be verified against relevant Government databases. This is most often accomplished through a federal fingerprinting process whereby the alien/applicant has such prints taken and the Government trial attorney thereafter receives the results. This requirement is codified in 8 U.S.C. § 1158(d)(5)(A), INA § (d)(5)(A).

Nowhere in the plain meaning of this statute cited above is there direct language placing an *additional* burden upon the alien/applicant to establish his or her identity outside of that which results from the fingerprint results. In fact, prior to the Ninth Circuit's unpublished decision in the present case, that court clearly recognized "all appropriate records or databases maintained by the Attorney General and by the Secretary of State" before asylum can be granted, "imposes *duties on the Attorney General* and the Secretary of State[ ] *[but] **[n]o new** burden for the asylum seeker.*" *Kalilu*, 516 F.3d 777, 779 (9th Cir. 2008) (emphasis added).

In the present case, the IJ believed that Petitioner purposely withheld his knowledge about his criminal history while residing in London, England, which ultimately was an attempt to conceal his identity. APPX. at 15-18. In turn, the IJ felt this misrepresentation was material and an attempt to present an application for relief in a manner inconsistent with the application's actual purpose put forth by Congress. *Id.* The IJ even found that in the so-called "identity" requirement, "Congress has specifically elevated the burden of proof for an asylum seeking to a higher threshold standard." APPX. at 12. The Ninth Circuit expressly adopted this reasoning. APPX. at 2.

What the first, and ultimately the last decision, wholly ignores is what was plainly within the record in connection with such "identity" requirement. Namely, that Petitioner dutifully completed his federal fingerprint requirement *prior* to the conclusion of

proceedings. APPX. at 29-30. This alone should have satisfied the requirement "the applicant has been checked against all appropriate records or databases maintained by the Attorney General and by the Secretary of State" per the plain meaning of U.S.C. § 1158(d)(5)(A), INA § (d)(5)(A). Moreover, Petitioner truthfully testified as to his true and correct name and every other name he had used prior to his entry into the United States. When questioned about the unauthenticated INTERPOL document, Petitioner forthrightly admitted to such and any knowledge he had of the origins of such incident in the UK.

In fact, the IJ even admitted that the case law is unsettled with regards to the importance of the identity requirement. APPX at 12-13. This concession is akin to the IJ, and by association the Ninth Circuit, essentially stating there is an ambiguity in the current state of the law with respect to identity requirement's actual importance. If this is the case, which appears likely, it is common knowledge that in the immigration context there is a "longstanding principle of construing any lingering ambiguities in deportation statutes *in favor* of the alien." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449, 94 L. Ed. 2d 434, 107 S. Ct. 1207 (1987) (emphasis added).

In sum, Petitioner *did honestly and forthrightly admit* to the existence of the conviction during the course of the proceeding before the IJ. APPX. at 129. Thus, the relevant fact here in regards to the conviction in the United Kingdom *is that Petitioner acknowledged its existence.* Even though Petitioner

could not recall the *exact* legal details, such is trivial and certainly not a material misrepresentation as the IJ so concluded. For the IJ and Ninth Circuit to fail to give credence to this testimony, and further wholly ignore Petitioner completed his fingerprint requirements, was to admittedly place a higher burden on Petitioner. This reasoning is completely against the Ninth Circuit's own published ruling that 8 U.S.C. § 1158(d)(5)(A), INA § (d)(5)(A) relates to a burden *on the Government* and *not* an additional burden on the alien/applicant. *Kalouma*, 512 F.3d at 1078-79. This inherently inconsistent and against-the-plain-meaning holding therefore creates a matter of national importance as it affects a federal appellate circuit with arguably the highest immigrant population.

II. A PURPORTED FRIVOLOUS APPLICATION FINDING OTHERWISE DEVOID OF ANY DELIBERATE MALFEASANCE BY PETITIONER CANNOT STAND BASED ON THE RESULTANT PERMANENT-BAR EFFECT AND ACCOMPANYING MISCARRIAGE OF JUSTICE.

The Ninth Circuit has correctly determined an IJ is required by law to consider an alien's testimony seriously and to support any rejections of the alien's testimony with specific, cogent reasons. *Damaize-Job v. INS*, 787 F.2d 1332, 1338 (9th Cir. 1986) (*citing Lewin v. Schweiker*, 654 F.2d 631, 635 (9th Cir. 1981)).

As referenced by the Ninth Circuit in the present case, the IJ noted that Petitioner swore in both his testimony and application for relief that should his party (BJP) have returned to power, he would gladly return to India. APPX. at 3. Specifically, the IJ found that based on the Government's presentation of country condition evidence, Petitioner's party *has* in fact returned to power, thus making his prior statement "not true." APPX. at 19. The IJ noted Petitioner's statement:

> [I]s nothing more than an effort to convince the Court of the sincere nature of his claim. He does not wish to go back to India even though his party is in control it shows that the respondent has other motivations for remaining in the United States and the motivations as to why he wishes to remain here are simply not known. It is clear they are other than political and related to the BJP as they are firmly in control and have been in control of his province in India.

APPX. at 21. The IJ concluded this statement was "nothing but an amentaceous attempt to embellish his claim," and that such was a "fabrication" which was "in an effort to win his case." APPX. at 27. The IJ found "these are among the fabrications to respondent's claim . . . he has filed a frivolous claim." APPX. at 27.

However, nowhere in the proceedings did Petitioner state it was a *factual certainty* that the opposition party, the UF, was still in power, but rather he

was *unclear* of the current political situation in India. Petitioner simply asserted it was his *belief*, which is akin to *opinion* (i.e. versus fact), that the Government of Gujarat was still led by the opposition Congress (a.k.a. "UF"). APPX. at 46-48. In fact, the IJ even conceded that based upon his long absence from India, "the [R]espondent, through his attorney, has *ably argued* why the Petitioner might not know the current governor given the governor's background." APPX. at 23.

Therefore, there is absolutely no logical explanation for the IJ's perfunctory opinion that Petitioner lied about the current governmental structure in Gujarat, and hence put forth a frivolous application. As such, there is clearly a lack of "cogent reasoning" for disbelieving Petitioner's testimony, and the IJ's holding was consequently in *legal* error per the Ninth Circuit's holding in *Damaize-Job v. INS*. For the Ninth Circuit to fail to correct this flawed reasoning was to again go against its own precedent thereby creating an unequal application of its jurisprudence.

Most importantly, the IJ's denial based upon "UF" party members in India not being in power is *completely irrelevant* to his asylum claim in regards to source of persecution under the principles espoused in *Avetovo-Elisseva v. INS*, 213 F.3d 1192 (9th Cir. 2000). In *Avetovo-Elisseva*, the Ninth Circuit held that fear of future persecution can be based upon groups the government is "unwilling or unable to control." *Id.* at 1196. This holding is relevant to the current case because it establishes that "people he

[Petitioner] feared most" as the IJ referred to, *need not necessarily* have control of the Government. They simply need to be a faction the Government cannot control.

During the course of the proceeding, Petitioner testified that even if the "UF" was not in control "the party which is not in power (referring to "UF") is also a powerful party and is equally powerful and can do things with assistance of money . . . even though the government has changed the people can still do anything and everything." APPX. at 47-48. Thus, as long as the UF still has monetary influence, which is clearly exhibited by their past ability to persuade Mr. Vaghella to switch parties prior to the 1996 elections [APPX. at 35-36], the UF would still have been in a position of influence in 2005 despite Petitioner's BJP party technically heading the Gujarat government.

The UF was therefore clearly still a powerful minority influence, and the members who "Petitioner feared most" (i.e., referring to Mr. Vaghella who had Petitioner jailed and tortured based on his political opposition [APPX. at 37-41]) are likely still in power with the UF. What this amounts to in regards to Petitioner's asylum application is that the UF, with its monetary influence, is a group the BJP "government cannot control." As Petitioner ably testified, members of the UF (i.e., Mr. Vaghella) were responsible for his arrest and torture in 1996, they still exist as a valid source of persecution for asylum purposes under *Avetovo-Elisseva*.

Therefore, it was in error for the IJ to rule that Petitioner made "blatant misrepresentation(s)" which amounted to a frivolous-application-finding. The point is that while the IJ certainly could have been ultimately correct in finding the country conditions had changed so as to undermine Petitioner's claim for asylum, but still have been in legal error in the frivolous-application-finding. In sum, there exists a high chance of substantial miscarriage of justice in allowing the frivolous application finding to stand when such holding is devoid of any deliberate malfeasance.

III. THE ERRONEOUS CREDIBILITY FINDING EQUALLY AND ADVERSELY AFFECTED THE CONVENTION AGAINST TORTURE CLAIM.

Article 3 of the United Nations Convention Against Torture ("CAT") and Other Cruel, Inhuman or Degrading Treatment or Punishment absolutely prohibits states from returning anyone to another state where he or she may be tortured. *See Al-Saher v. INS*, 268 F.3d 1143, 1146 (9th Cir. 2001) ("Article 3 provides that a signatory nation will not expel, return . . . or extradite a person to another country where there are substantial grounds for believing that he would be in danger of being subjected to torture.") (internal quotations omitted).

> Torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for

> such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

Kamalthas v. INS, 251 F.3d 1279, 1282 (9th Cir. 2001) (quoting 8 C.F.R. § 208.18(a)(1) (2002)).

The Ninth Circuit, by its own precedent, determines a negative credibility finding in asylum claim does *not* preclude relief under the CAT. *Kamalthas v. INS*, *supra*, at 1283. Therefore, the Ninth Circuit's and IJ's holdings that "the same adverse credibility finding is controlling for any and all benefits" under the CAT was clearly in error. APPX. at 4. As Petitioner's testimony truthfully demonstrated the likelihood of future torture, he should have been afforded relief under CAT.

CONCLUSION

Based on the foregoing, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 1, 2010

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HINAL A. PATEL, Petitioner, v. ERIC H. HOLDER, Jr., Attorney General, Respondent.	No. 05-71627 Agency No. A075-491-301 MEMORANDUM* (Filed Jul. 19, 2010)

On Petition for Review of an Order of the Board of Immigration Appeals

Submitted April 15, 2009**
Pasadena, California

Before: CANBY, RAWLINSON and N.R. SMITH, Circuit Judges.

Hinal A. Patel ("Patel"), a native and citizen of India, petitions for review of an order of the Board of Immigration Appeals affirming without opinion a decision of an immigration judge ("IJ") denying his application for asylum, withholding of removal, and relief pursuant to the Convention Against Torture

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

("CAT"). Patel also seeks review of the IJ's finding that he filed a frivolous application for asylum. We have jurisdiction pursuant to 8 U.S.C. § 1252. We review Patel's claims for asylum, withholding, and CAT relief for substantial evidence. *See Singh v. INS*, 134 F.3d 962, 966, 971 n.16 (9th Cir. 1998) (asylum and withholding); *Shrestha v. Holder*, 590 F.3d 1034, 1048 (9th Cir. 2010) (CAT relief). We review under the preponderance of the evidence standard the IJ's finding that Patel filed a frivolous application. *See Ahir v. Mukasey*, 527 F.3d 912, 918-19 (9th Cir. 2008) (adopting the standard established by *In re Y-L-*, 24 I. & N. Dec. 151, 159 (B.I.A. 2007)). Applying these standards, we deny the petition for review.

Substantial evidence supported the IJ's adverse credibility finding. The IJ focused on three major faults in Patel's application for relief and his testimony. First, the IJ stated that Patel had failed to present credible evidence of his identity. He entered the United States under the name of Abdullah Bodhiniya, using another person's passport. He had previously entered Great Britain under the name of Grupa Singh, using Singh's passport. While in Great Britain, he was arrested and convicted of attempting to depart the country using another person's passport. At his removal hearing in the United States, the only documentary evidence of identity produced by Patel was an Indian passport showing his address to be a location in Texas where Patel had not lived. On this record, the IJ could well entertain doubts about Patel's identity.

The second ground of the IJ's adverse credibility determination concerned Patel's statement in his application that he had been persecuted by the political party in power in his home province of Gujarat, India, and that he feared to return as long as that party was in power. At the time of his application and at the time of Patel's hearing, however, the party that allegedly had persecuted Patel had been succeeded in power, in Gujarat and nationally, by Patel's party, the Bhartiya Janata Party ("BJP"). Patel nevertheless testified that he feared to return. He was also vague in his descriptions of his party and its leadership.

Finally, Patel's application form asked him to relate whether he had ever been arrested, detained or convicted. He told the IJ that he had reviewed his application and understood it. In the application, he stated that he had endured several days' detention and beatings in India, but did not mention his arrest and incarceration in Great Britain for fraudulent use of a passport. In his testimony, he stated that he had simply forgotten that incident.

In light of these major discrepancies or false statements, the IJ had ample reason to enter his adverse credibility finding. Patel's explanations for these discrepancies or false statements was unconvincing. These credibility deficiencies went to the heart of his claims for relief. *See Li v. Ashcroft*, 378 F.3d 959, 962 (9th Cir. 2004).

The IJ's adverse credibility finding accordingly is supported by substantial evidence. It is sufficient to

defeat Patel's claims for asylum and withholding of removal. *See Chebchoub v. INS*, 257 F.3d 1038, 1042-44 (9th Cir. 2001). Although the adverse credibility finding alone does not necessarily defeat Patel's claim for relief under the Convention Against Torture, *see Kamalthas v. INS*, 251 F.3d 1279, 1280 (9th Cir. 2001), substantial evidence, including the evidence of country conditions in India, supports the IJ's finding that it was not more likely than not that Patel would be tortured if removed to India. *See* 8 C.F.R. § 1208.16(c)(2).

Finally, the IJ's finding that Patel filed a frivolous application for asylum is well supported by the record. Patel made at least two significant and material misrepresentations in his application, both of which the IJ found to have been deliberately fabricated. Those findings are supported by a preponderance of the evidence. *See In re Y-L-*, 24 I. & N. Dec. at 157 (stating preponderance standard). The IJ gave Patel ample notice of the consequences of these misrepresentations and an opportunity to correct them. *See id* at 155. No sufficient correction was made.

PETITION FOR REVIEW DENIED.

Rawlinson, Circuit Judge, concurring:

I concur in the result.

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

==========

File: A75-491-301 – San Diego Date: FEB 25 2005

In re: PATEL, HINAL A.

IN ASYLUM PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Hilts, Murray D., Esquire

ON BEHALF OF DHS:
Janet Muller, Assistant Chief Counsel

ORDER:

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 1003.1(e)(4).

/s/ [Illegible]
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
San Diego, California

File No: A 75 491 301 September 22, 2003

In the Matter of

HINAL A. PATEL,	)	IN ASYLUM ONLY
a.k.a.	)	PROCEEDINGS
ABDULLAH BODHANIVA,	)	
a.k.a.	)	
GURPAL SINGH,	)	
Respondent.	)	

CHARGE:

APPLICATIONS: Asylum; withholding of removal; benefits under the United Nations Torture Convention.

ON BEHALF OF RESPONDENT:	ON BEHALF OF DEPARTMENT OF HOMELAND SECURITY:
Murray D. Hilts, Esquire	Kathleen M. Zapata, Esquire
1011 Camino Del Rio S., Ste 350	880 Front Street, Ste. 1234
San Diego, California 92108	San Diego, California 92101

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent, a self proclaimed 25-year-old native and citizen of the country of India, was placed

in these asylum only proceedings in accordance with the pertinent regulations on February 21, 2002 when the Government served upon him a Notice of Referral to Immigration Judge (Form I-863) (Exhibit 1). The charging document was filed by the Department of Homeland Security (then known as the Service and this Court will continue to refer to it as the Service) with this Court on April 18, 2002, vesting this Court with jurisdiction over the respondent's case. It is clear that jurisdiction vests with this Court under 8 C.F.R. Section 208.2(c)(1)(i)(b) (2003) (The Court uses the printed revised version as of January 1, 2003 in citation to the regulations). The respondent is clearly not entitled to proceedings under Section 240 of the Act therefore the only remedies that this Court can consider are asylum, withholding, and benefits under the United Nations Torture Convention. The Court cannot consider any other forms of relief given the manner in which the respondent arrived to this country from Great Britain.

The Court emphasizes the procedural history of this matter to highlight the amount of time that the respondent has had to fully prepare for his case. Furthermore, the Court on August 1, 2002, explained to the respondent that not only did he have the right to be represented by an attorney (a right that he has exercised throughout) there were very serious penalties to a person who knowingly filed a frivolous application for asylum. When the respondent appeared first before this Court on July 11, 2002 his case was continued until August 1, 2002. At the

hearing on August 1, 2002 the Court did review with the respondent and his attorney the contents of the asylum application (group Exhibit 7). The Court informed the respondent that he should review it carefully with his attorney. The Government itself further placed the respondent on notice that the burden of proof would be on him (Exhibit 12) by requesting that the respondent produce relevant documents and identify witnesses.

At the initial merits hearing on February 10, 2003 the Service made a motion for continuance. The attorney who was present for the Government on that day indicated that the lead attorney (the attorney who is present in court today) had done a significant amount of preparation and could not appear for health reasons on February 10, 2003. Furthermore the respondent himself had not had proof that his fingerprints had been taken in conjunction with his asylum application. The Court discussed preliminary matters on February 10, 2003 in particular to ask the respondent if he had ever lived in Texas because the supplemental documents that he had offered (Exhibit 11) reported an address in the United States as being in Texas. And his asylum application did not disclose having an address in Texas. The significance of that evidence is to emphasize that the respondent on February 10, 2003 was given an opportunity to make changes. The respondent made two specific changes with the help of his attorney. After making those changes the respondent explained to the Court without hesitation that he was fully aware of the contents

of this application and the contents of his application were true and correct as of February 10, 2003. Counsel has alluded to the fact that the respondent might have wanted to make additional changes on today's date. But those changes would not be permitted because the respondent had already sworn to the truth of the contents of his application before this Court on February 10, 2003. That is evidenced by the respondent's testimony under oath on that day and it is also evidenced by the respondent's signature under part H of the application swearing to the contents of his application before this Court on February 10, 2003.

The Court then also explained to the respondent the burden of proof was on him. And he was suggested that he should supplement the current application with evidence of country conditions. Those supplements were invited by the respondent on or before July 22, 2003. The Government was given until August 22, 2003 to apply. The respondent filed nothing by it's deadline. The Government responded by filing its submission of evidence (group Exhibit 14) on August 22, 2003.

As part of its evidence the Government described its efforts to try to track the respondent's journey to the United States and what he may have done in another country prior to coming to the United States. The Government received a communication from the International Criminal Police Organization (Interpol) United States National Central Bureau that it has received a communication that the respondent was

known in London in criminal embassies by name and by that name he was known to have a conviction for fraud. The respondent has objected to the admissibility of the document. That objection has been overruled. The respondent on today's date for the first time actually acknowledges an arrest and a conviction for something while in London, England.

On today's date both parties were prepared to go forward. The respondent relies on his testimony and some of the evidence regarding background country conditions in an effort to meet his burden of proof. The Government counters that the Department of State Country Report shows that the respondent's very own party is the ruling party not only in that country but also in his own province.

The Court, for it's part, was aware of certain evidence of country conditions some of which was not reflected by the Country Report therefore consistent with the Board of Immigration Appeals Decision in *Matter of S-M-J-*, 21 I&N Dec. 722 (BIA 1997) provided that evidence to both parties. Evidence that was taken from a website that purports to be from the respondent's own province showing that both the governor and the chief minister of his province are from the very same party from which the respondent professes his own involvement. The Court, consistent with that Board decision, made it apart of the record and gave the parties an opportunity to review it, respond, and voice any objections. The respondent, through his attorney, has ably argued why the respondent might not know the current governor given

the governors background. But in this Court's view, as it will explain, there are more serious problems with respondent's claim other than his lack of knowledge of the current governor.

That is the procedural overview of the case. Before examining the nature of the evidence the Court next turns to a review of the law.

To be eligible for withholding of removal under Section 241(b)(3)(A) of the Act, the respondent's facts must show a clear probability of persecution in the country designated for removal on account of race, religion, nationality, membership in a particular social group, or political opinion. *See INS v. Stevic,* 467 U.S. 407 (1984). This means that the respondent's facts must establish that it is more likely than not that he would be subject to persecution for one of the grounds specified.

To be eligible for asylum under Section 208(a) of the Act, the respondent must meet the definition of a "refugee," which requires him to show persecution, or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The burden of proof required to establish withholding of removal is generally greater than that required for asylum, with certain noted exceptions. Congress amended the Act significantly with the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA). Among the changes Congress imposed a time limit for an asylum seeker to request

this relief. In addition it required for the first time there would be a prohibition on granting asylum until "the identity of the applicant has been checked against all appropriate records or databases." Section 208(b)(5)(A)(i) of the Act.

It appears to this Court then that Congress has specifically elevated the burden of proof for an asylum seeker to a higher threshold standard. A clear and convincing evidence that the application is being filed within one year after the date of the individual's arrival into the United States, and an absolute standard that the individual cannot be conferred asylum until the identity checks have been done as required by statute. With respect to the later requirement, it would seem that even if a person has been "credible" as the case law would interpret that term to mean, the person would still be ineligible for asylum unless his or her identity could be checked as required by the statute. In this Court's humble view it requires more than just a ministerial act by the Government. *Compare Matter of B-J-*, 23 I&N Dec. 572 (A.G. 2003) (the Attorney General offers his view of the importance of national security grounds in bond proceedings but those same national security grounds would be equally applicable in the asylum context for the identity checks).

Once an individual establishes eligibility with respect to these two issues above, then the burden of proof for asylum becomes less than what is required for withholding of removal. An asylum applicant can show that his fear is "well-founded" if he shows that a

reasonable person in his circumstances would fear persecution. Furthermore, asylum, unlike withholding of removal may be denied in the exercise of discretion to a person who establishes his statutory eligibility for relief.

An asylum applicant under Section 208(a) of the Act may establish his claim by presenting evidence of past persecution in lieu of evidence of a well-founded fear of persecution. *See Matter of H-,* 21 I&N Dec. 337 (BIA 1996); *Matter of B-,* 21 I&N Dec. 66 (BIA 1995); *Matter of D-V-,* 21 I&N Dec. 77 (BIA 1993); *Matter of Chen,* 20 I&N Dec. 16 (BIA 1989). If the respondent does not show evidence of past persecution he can present evidence of a well-founded fear of persecution in attempting to establish that a reasonable person in his circumstances would fear harm if returned to the country from which he faces return. There must be a reasonable possibility of actually suffering such persecution. The asylum applicant must show that his fear of returning is both subjectively genuine and objectively reasonable. The objective component requires a showing by credible, direct, and specific evidence in the record of facts that would support a reasonable fear that the asylum applicant faces persecution. He can meet his burden of proof through his own testimony without offering a scintilla of corroborative evidence if that testimony is credible. However if he presents incredulous testimony then it is incumbent upon him to present corroborative evidence which would appear to be reasonably available to him. *See Singh-Kaur v. INS,* 183 F.3d 1147

(9th Cir. 1999); *Mejia-Paiz v. INS,* 111 F.3d 720 (9th Cir 1996); *Lopez-Reyes v. INS,* 79 F.3rd 908 (9th Cir. 1996); *Matter A-S-,* 21 I&N Dec. 1106 (BIA 1998); *Matter of Dass,* 20 I&N Dec. 120 (BIA 1989).

The testimony of the respondent and its impact upon credibility is even more crucial regarding the amendments made to the Act by Congress particularly now with the emphasis on the individual's "identity" as he is seeking refugee status in this country. Under Section 208(b)(5) of the Act it appears to this Court that the Government today continues to try to verify the respondent's identity as it continues the very difficult process of trying to follow a person from various countries.

The Court has examined the many published decisions by the Board of Immigration Appeals and the published decisions within the United States Court of Appeals for the Ninth Circuit. Sometimes the Board and the Ninth Circuit agree with the adverse credibility determination (*See Kaur v. INS, supra*; *Mejia-Paiz v. INS, supra*) and *Matter of O-D-,* 21 I&N Dec. 1079 (BIA 1998)) and sometimes the circuit and the Board do not agree with the adverse credibility determination of the Immigration Judge (*Lopez-Reyes v. INS, supra*; *Matter of B-, supra*)). Those decisions and the other decisions are significant to this Court because the Court still is not aware of any published decision which addresses the amendment made by Congress regarding the identity checks on the issue of credibility. This Court is not aware of any published

decision. It seems though that it is something that is more than a ministerial requirement.

The threshold question before this Court is whether the respondent has been a credible witness and whether he has presented credible evidence to this Court. Credibility is also a function of an evaluation of respondent's demeanor as he's testified in these proceedings. First the respondent presents himself to be a very educated young man. This is not a situation in which the individual was uneducated. Here the respondent has testified that he has pursued high learning. He has explained for example certain discrepancies between his marriage license in which he writes that he has the equivalent of 15 years education with this asylum application which suggests only 13 years. The Court could not help but notice the respondent answered those questions without hesitation to provide a straightforward explanation as to why his application might show only 13 years of education where his marriage certificate would show 15 years.

If one considers carefully the straightforward manner in which he answered questions about his education with the testimony regarding his knowledge of the Bhartiya Janata (BJP) and an explanation as to why he refused to tell the Court of his arrest in Great Britain when he swore to the application on February 10, 2003. It shows a sophistication on the respondent's part to try to present the claim that he wishes to present without disclosing all material facts in an effort to win his case.

The Court makes a clear adverse credibility determination. It begins first with a very significant omission by the respondent in his application. In his application at group Exhibit 7 the respondent is specifically asked if he or any member of his family has ever been arrested, detained, convicted and sentenced in his country or any other country or in the United States. The respondent specifically checked that he had been detained and he wrote about what happened to him in 1996. He wrote with specificity even the days in which he was detained September 24 to September 30th. He remembered the amount of bribe his father had to pay to get his release. He also listed particular witnesses by name. He remembers the specific day when he arrived in London, England on October 5, 1996. He also writes with alacrity the day he arrived in Los Angeles on December 30, 1996. It is significant that he omitted any arrests, detention, and conviction in London, England. As the Government is trying to track down the very nature of that conviction the early signs are that it relates to fraud. The respondent tried to explain today that he forgot about his arrest and conviction in London, England and that is why he omitted it. The respondent, however, has tried to explain that other discrepancies exist because he prepared his application so long ago that on December 10, 1997. If the Court were to accept that explanation then there would certainly be no excuse whatsoever for the respondent to omit what would have been a significant event in his life that is his arrest and detention in London, England. The Court

believes that the respondent out and out lied to the Court when he signed his application on February 10, 2003 under oath. The fact that he was lying to the Court is evidenced by the peculiar statement in his application on page 6, question 6 in which he wrote that he left England when it "became impossible for [him] to stay any longer." That statement is a bold statement. Certainly if the respondent suffered a conviction that would relate to fraud or another serious action it might become impossible for him to remain here. When the Court compares that statement with the statement completely unsupported that the United Kingdom does not grant asylum to people from India the Court is left with very little doubt, if any, that the respondent was simply trying to pull back any detention, arrests, or conviction in London, England. As of today's date the Court still does not know the nature of that conviction.

The Government, in good faith, presented to the respondent on August 22, 2003 its efforts to try to find out what the respondent was doing in London, England. The Government response was met with objections. Rather than the respondent himself trying to participate in carrying his burden of proof to discover what had happened to him it was not until the proceedings today during direct and cross-examination that he was willing even to admit to the arrest. Even though he has a college education the respondent feigned knowledge of any of the details of what happened professing not to know.

In the end it appears that it could be conviction regarding fraud. It appears to be an incident relating to the use of a passport. It is something that goes to the respondent's very identity. He omitted it under oath even though he was represented by counsel throughout and had a significant period of time to review the contents of his application. As of today's date the Court still does not know the nature of the arrest. All the respondent wished to give were specific details of his arrest in India but not disclose any details of any arrest in London, England. It is material to the respondent's identity and to the very reasons why he left London, England and did not seek asylum there. His omission is significant. It was done while he was under oath and it goes to the very reasons why he's motivated to come to this country from London, England.

That is not the only omission or discrepancy which goes to the core of the respondent's claim. The respondent was very vague regarding his involvement in the BJP party prior to September 20, 1996. The respondent could not give the Court basic facts regarding his party. He did add specific details regarding his involvement from about September 20, 1996 until he was arrested on September 24, and then released on September 30, 1996. He did not though provide any details about his party afterwards. He provides in his application specific names of witnesses and other party members yet today he does not seem to know any details. The Court points out that he does have a proficiency in the English

language and he offered a document in support of his application regarding events that had taken place on November 19, 1996 in India regarding the BJP party against the corruption of the United Front government. The respondent didn't seem to know anything about that party or government even though he was the proponent of the article which the Court points out appears to be incomplete). This is not the situation where the Court was asking him questions about evidence that the respondent did not present but this was evidence that the respondent presented himself. Presumably he offered this evidence to show the BJP's actions to try to launch or raise the issue of corruption against the United Front government in the party against whom the respondent himself was presumably protesting in September of 1996.

The respondent has again made a blatant misrepresentation in his asylum application which he's sworn to under oath on February 10, 2003. As part of his attachment to his application he wrote "I have been waiting for a change of government in Gujarat from that of one led by the opposition Congress party, so that I can go back to my country, but unfortunately it has not happened." This statement is a blatant contradiction with the respondent's testimony under oath before the Court today in which he states that in late 1996 or in 1997 the BJP party actually regained control of the government. Furthermore, the statement is not true. The respondent is even unwilling to go back to India given the significant and wholesale changes that have taken place in India in his own

province of Gujarat. As the Court has pointed out to the respondent both the governor and the chief minister are in control of Gujarat today. The respondent might not know who the governor is but he has said he does know who the chief minister is but he seemed very vague in his knowledge of the chief minister.

As the Department of State report offered by the Government suggests (group Exhibit 14) there are very significant problems in Gujarat today but those seem to be focused upon a persons religion. The persecutors appear to be the respondent's own political party the BJP. On page 17 of the report at group Exhibit 14 the Department of State pointed out that in February of 2002 there was an attack by Muslims on a train in Godhra that resulted in the deaths of 58 Hindus which lead to an estimated 2000 Muslims being killed in rioting in Gujarat. Beginning in February 28 the Hindus attacked and looted Muslim's homes, businesses, and places of worship. These riots continued from March to mid May. Certain non-governmental organizations have reported that the police were implicated directly in many of these attacks and in some cases these groups contended that police officials even encouraged the mob. The Gujarat state government and the police were criticized for failing to stop the violence and in some cases for participating in and encouraging it. The Department of State report goes on to point out that the Gujarat chief minister, Narendra Modi (the same person that the respondent vaguely understood and remembered as being a member of his own party)

personally told certain police officials on February 27 to allow Hindus two days to react "peacefully" to the Godhra incident.

The same Department of State report at page 20 reflects that elections have been held at Gujarat which took place in a "somewhat free and transparent manner, however, there were reports that persons had been left off the electoral register."

The reading of the Department of State report would reflect that the respondent's political party is in clear control of his state. This then shows that the respondent's statement at attachment two that he would go back if his party was in control is nothing more than an effort to convince the Court of the sincere nature of his claim. He does not wish to go back to India even though his party is in control it shows that the respondent has other motivations for remaining in the United States and the motivations as to why he wishes to remain here are simply not known. It is clear that they are other than political and other than related to the BJP as they are firmly in control and have been in control of his province in India. He wishes to say that he did not change the statements or that those statements were made close in time to when he traveled to the United States. That of course does not explain his testimony today that would show according to the testimony today his own political party was in control at the time that he prepared his application. Furthermore, the respondent has had an opportunity to make changes with the help of his attorney. Indeed on February 10,

2003 before the respondent swore tho the contents of its application he did make two specific changes. For some reason he did not change anything pertaining to the statement that he would not go back to India. The Court also emphasizes that the statement was not one standing alone as part of his application. But he went on to say that his problems were really with Mr. Vaghella and Mr. Parekh. He wrote that they appeared to be in power for many years to come.

For these reasons then the Court can give no weight to the respondent's testimony that he was arrested on September 24, 1996, detained and beaten until September 30, 1996. It simply could be a memorized account as the respondent was not able to provide details of his party before or after that incident. The respondent is motivated by a desire to stay in the United States but it's not clear what his reasons are. It is clear that he did not want to tell the Court about the detention in London, England and it is clear that even though his so-called party of support which is in power today the respondent still does not want to go back to India. For those reasons and because the Court still does not know the respondent's true identity and motivation for coming to this country today the Court concludes that he has presented an incredulous claim. It is one with significant omissions and it is contradicted by the evidence of country conditions. His application for asylum is denied based upon the adverse credibility determination.

In addition, the respondent would have appeared to have evidence of country conditions reasonably available to him. As stated above he is an educated person. He could have presented evidence to show that Great Britain would not let people from India seek asylum in that country. That type of evidence does not even involve the country of India at all. Notwithstanding the length of time that he's been in the United States he has chosen for tactical reasons or otherwise not to get that evidence. In addition, he's not provided any evidence to show what took place and why he was arrested or detained in London, England. That is also evidence that would be reasonably available to him. Instead he relies upon the United States Government to carry the very costly burden to try and track that down. His attorney ably points out that this Court has no documentary evidence that he's been convicted instead the Government is still trying to track that down to what must be very expensive and resource intensive measures. The respondent himself has appeared to take no effort whatsoever to clear up that matter and show what the conviction was that he suffered in London, England. Last, the respondent has taken no effort to update the record with evidence of country conditions. The evidence of country conditions actually contradicts his claim. This evidence would appear to have been reasonably available to the respondent without leaving the United States. He simply could gather evidence of his political party from the United States but he's elected not to do so. He says that he did not want his father to write to him in the United States

but yet that explanation is completely unsatisfactory. He told the Indian authorities already that he was in the United States when he obtained his passport. He used an address in Texas that belonged to his friend. He certainly could have papers from India sent to him there or even sent to him through his attorney. Instead it would appear that he did not want to present evidence of country conditions because the very party to which he belongs is actually the party in power. Of course it is a tactical decision that can be made by respondent not to offer corroborative evidence that could be reasonably available to him. *See Matter of B-B-*, 22 I&N Dec. 309 (BIA 1998). In this case the Court finds that the respondent has had representation by able counsel, he's had the opportunity to present the corroborative evidence, and he's had the time in which to provide the corroborative evidence, and for tactical reasons because it actually undercuts his claim he's elected not to do so. His application for asylum is also denied because he's failed to present corroborative evidence that would appear to be reasonably available to him and he's elected not to do so.

Even if the respondent had presented a credible claim his application must be denied as a matter of regulation because the Government has carried its burden of proof to show by overwhelming evidence that given the seven years that the respondent has been outside of India a dramatic change has taken place. So the respondent's very own political party is now ensconced and entrenched and in control of the

police in the very region from which the respondent has fled. In fact his father has remained in that very state without any apparent problems. The Government has established that even if the respondent had presented a credible claim that as a matter of regulation significant events have taken place in respondent's own province and that there would be no well-founded fear and no reason why the respondent could not go back to his state today and actually participate in the political process with the protection of the police. Even if he had been a credible witness and had suffered a detention for six days in 1996 dramatic events have taken place such that he would no longer have a well-founded fear of persecution. Under the regulation he has not established any other reasons or any other type of harm that could occur to him if he were forced to go back. His application for asylum is denied for all of the reasons stated above.

Inasmuch as the respondent has failed to meet the lesser burden of proof required for asylum it follows that he has failed to meet the stricter burden of proof required for withholding of removal to India under Section 241(b)(3) of the Act. The adverse credibility finding that the Court has made above and the conclusion that the Government has carried it's burden of proof to show the dramatic changes in country conditions are equally applicable to the higher burden for withholding of removal. His application for that form of relief is denied.

The same adverse credibility finding is controlling for any and all benefits under the United Nations Torture Convention with the following additional

explanation. In order to qualify for this remedy the respondent would have to show that it "more likely than not" that he would be tortured if removed to the proposed country of removal. He could meet his burden of proof through his own testimony if that testimony was credible, consistent and detailed. Even if the Court makes an adverse credibility determination it still must look at the objective facts to determine whether the respondent has meet his burden of proof under the United Nations Torture Convention. *Compare Al-Harabi v. INS,* 242 F.3rd 882 (9th Cir. 2001) (individual from Iraqi airlifted to Guam demonstrated objective facts to support the grant of Torture Convention notwithstanding adverse credibility determination). In this case the objective facts show that the respondent's very own political party is and has been in control of his province. The respondent has not shown any possibility whatsoever that the current chief minister, the police, or anyone else for that matter would be interested in the respondent today. The respondent's application for any and all benefits under the United Nations Torture Convention is denied.

In fact the key issue before this Court is whether the respondent has been given proper notice and after having been given proper notice whether he has made material misrepresentations such that the Court should conclude that he has filed a frivolous application for asylum. First the respondent has filed his application with the Government after IIRAIRA. Second, the respondent has had the required notice under Section 208(d)(4) of the Act. This Court has

specifically advised the respondent of the consequences of knowingly filing a frivolous application for asylum. This Court did so on August 1, 2002. The respondent also has exercised his right to be represented by an attorney of his own choosing during the asylum process. The whole process before the Immigration Court has been an asylum process. After having been given the warning the respondent signed his application on February 10, 2003. The Court finds that he has deliberately fabricated his application after having been given the appropriate notice. Firstly, he has knowingly withheld a detention, arrest and conviction in London, England. That conviction apparently goes to an issue of fraud and his identity. He has provided an unsatisfactory explanation that is that he forgot about it. It was apparently only today during direct and cross-examination that he remembered it. And that coincides with the Government's efforts to try to go through the cost and expense of tracking it down. Furthermore, the respondent on February 10, 2003 signed the contents of this application in which he wrote that he could go back to his country if there was a change in government. He lead the Court to believe that the two people that he feared most would be in power for many years to come. They are not in power today and they were not in power for the many years, according to his own testimony. The respondent has had no intention of going back to his country. The statement sworn to by him under oath is nothing but an amentaceous attempt to embellish his claim. It is a fabrication, it is not true. The respondent did so in an effort to win his case. The Court finds that these are among the

fabrications to the respondent's claim. He has had the proper notice, he has exercised his right to pursue asylum after the proper notice and after having been given such notice he has filed a frivolous claim. Accordingly the Court will enter the following orders in these asylum only proceedings.

ORDER

IT IS HEREBY ORDERED: that the respondent's applications for asylum, withholding of removal, and benefits under the United Nations Torture Convention being and are hereby denied.

IT IS FURTHER ORDERED: that the respondent has received the proper notice under Section 208(d)(4)(A) of the Act and in accordance with Section 208(d)(6) has knowingly made a frivolous application for asylum so he shall be permanently ineligible for any benefits under the Act effective as of the date of any final determination of his application.

IT IS FURTHER ORDERED: that the respondent be remanded to the custody of the Department of Homeland Security or any execution of any orders of removal or for further action by the Department of Homeland Security under the visa waiver overstay provisions of the Act.

RICO J. BARTOLOMEI
Immigration Judge

U.S. Department of Justice
Executive Office for Immigration Review
Immigration Court

Matter of		File A 75 491 301
HINAL A. PATEL, a.k.a. ABDULLAH BODHANIYA Respondent	)))))	IN ASYLUM ONLY PROCEEDINGS Transcript of Hearing

Before RICO J. BARTOLOMEI, Immigration Judge

Date: September 22, 2003 Place: San Diego, California

Transcribed by DEPOSITION SERVICES, INC. at Rockville, Maryland

Official Interpreter: Deepak Sacheva

Language: Hindi

Appearances:

For the Department of Homeland Security:	For the Respondent:
Kathleen M. Zapata, Esquire	Murray D. Hilts, Esquire

* * *

[32] A. July 22?

Q. Correct, that was the deadline for his supplemental evidence, notification of fingerprints.

A. Oh, we did not file any supplemental information. The notice of fingerprints, I believe he did his

fingerprints. We requested additional documents but I did not receive anything forthcoming from my client.

Q. But I specifically wanted, counsel, notification that his fingerprints had been taken by July 22, 2003.

A. I don't think we actually did submission, I apologize, but I think they were taken, Your Honor.

Q. When were they taken, counsel?

A. I believe March 27, 2003.

MS. ZAPATA TO JUDGE

Q. And that's confirmed in the Government's file, Your Honor.

* * *

[34] Counsel, as I understand the Government's submission is not offered to prove that a conviction does exist against this respondent it's simply a notification to the respondent in fairness to him that an investigation is continuing.

MS. ZAPATA TO JUDGE

Q. That's correct, Your Honor, it was actually intended as a notification to the Court that there was an ongoing investigation. Unfortunately I have requested additional information from a special agent, Patrick McCreary at Interpol and I have not received a response from him yet. I have been trying to reach him since the middle of last week and have left several voice mails but haven't received any

additional information. And would you represent, counsel, because one of the objections made by –

* * *

[35] The reason I included the fax cover sheet was because it's the only authentication I have to indicate that this was received via facsimile from Special Agent Patrick McCreary. He is the DS which I know to stand for diplomatic security. He's the diplomatic security liaison officer at Interpol and I have been speaking over the past several months since the last hearing to try to get more information about the background of this gentleman. He in turn is relying on Interpol in the United Kingdom and so we have no real control over their willingness to provide us with information. So he sent me what he had which was the attached telex copy.

* * *

[42] Q. What's your full and complete name?

A. Hinal Patel.

Q. And what is your date of birth?

A. 27th of December 1977.

Q. And how old are you today?

A. 25.

Q. And where were you born?

A. India.

Q. What town in India.

A. Surat, S-U-R-A-T.

Q. And, I don't know if that's a state, is that a specific state?

A. Gujarat, G-U-J-A-R-A-T.

Q. Were you involved in any political party?

A. Bhartiya Janata party, B-H-A-R-T-I-Y-A J-A-N-A-T-A.

* * *

[43] Q. What does the BJP stand for?

A. The leaders of Bhartiya of that place, they help and assist people of Gujarat and also of other states.

Q. Okay, what were their goals?

A. So that there is comfort and less pain over there among people, to help the poor people, also to remove unfairness or injustice aspects.

Q. Was anyone else in your family active with the BJP?

A. My father.

Q. And what was his role?

A. He use to help. He was active in a sense he use to help the leaders like for example like organizing and assisting in rallies and also administering processions.

Q. Were you active in the BJP?

A. Yes, where all the youthful guys live I was a leader of them.

Q. And what was your role?

A. To assist them, going over there and assisting the leaders and having neighborhood meetings held and informing the people how the other parties are incorrect.

Q. Is there a name for a local meeting?

[44] A. We use to call them Mullah meeting, M-U-L-L-A-H.

Q. Did you ever make speeches?

A. Yes.

Q. What were the nature of those speeches?

A. Just informing the people or different people you know pertaining to Congress and that the Bhartiya Janata party would not do it such a way and would do it correct and would be helpful in doing it.

Q. Who would you be speaking to?

A. All the gather which was there in that Mullah meeting.

Q. When did your problems start?

A. In 1996 when the elections took place.

Q. For what elections were you talking about?

A. The elections which were to be held in Gujarat those elections I'm talking about.

JUDGE TO MR. HILTS

Q. And counsel excuse me for just a moment. Excuse the interruption, counsel, please resume.

MR. HILTS TO MR. PATEL

Q. Was the election for just Gujarat or the whole country?

A. Gujarat.

Q. And what happened in that election?

A. The leader of Bhartiya Janata party was Shankar [45] Singh Vaghella and after the elections the Congress party tried to seduce him toward their side.

JUDGE TO MR. HILTS

Q. Counsel, we need to get a spelling of that name for the transcriber. Do you have one?

A. It's Shankar, S-H-A-N-K-A-R Singh, S-I-N-G-H Vaghella, V-A-G-H-E-L-L-A.

Q. Thank you, please resume.

MR. HILTS TO MR. PATEL

Q. Who won the election?

A. Bhartiya Janata party.

Q. The BJP?

A. BJP. You see the leader of Bhartiya Janata party actually had gone over to the Congress party and thus won the elections. So eventually as such it was the Congress which came and took power.

JUDGE TO MR. HILTS

Q. But counsel he did say, and the record would reflect, the Bhartiya Janata party which is the same thing as the BJP.

MR. HILTS TO MR. PATEL

Q. So how did this happen?

A. The Congress party dangled a carrot in front of Mr. Vaghella and promised him that if he would come over to their party then they would give him the highest seat and also a lot of [46] power and status.

Q. Was this before or after the election.

A. Before.

Q. So who actually received more votes Congress or BJP?

A. You see Mr. Vaghella, you know, in Congress he went and he won but prior to that when he was with BJP we were the ones campaigning for him.

JUDGE TO MR. HILTS

Q. Counsel, perhaps for my benefit you can establish some times as to what took place and when it took place.

A. Okay.

MR. HILTS TO MR. PATEL

Q. What day was the general election?

A. On the 20th we had organized a big rally over there.

JUDGE TO MR. PATEL

Q. Sir, listen to the question that your attorney asks of you and answer his question.

JUDGE TO MR. HILTS

Q. Repeat your question again please counsel.

MR. HILTS TO MR. PATEL

Q. When was the actual election?

A. 18th of September 1996.

Q. And when did Vaghella switch parties?

[47] A. When the elections were to be held just before that about a day before.

Q. So how did that sway the election?

A. You see we had been campaigning for Vaghella all this time and had promised to the world or informed the world that he would do the following good things and he was a good man for the position and so on. And then Vaghella went to the other side people still tended to believe that Vaghella is a good man and he will do all those things which are promised and therefore they voted for him.

Q. Okay, so how did you react to this switch?

A. We were not at all pleased with this action of Vaghella.

Q. Was the central government willing to step in?

A. So when this happened you know the people over there were very, there was an uproar because people were not happy. And at that same time, you know, the main government was also of Congress so therefore they were pretty pleased with how things were shaping up for them.

Q. So you say you were unhappy what did you guys do at that point?

A. You see when this happened we organized gatherings Mullah meetings and gathered people and informed the people that what Mr. Vaghella has done is not good and not right and that Congress has given him a lot of money for this action which he [48] has taken. And then we decided that on the 20th we are going to organize a big rally.

Q. What were you supposed to do in that rally?

A. It was primarily to inform the people all around that what has happened is not good and is not right. And what the Congress had done by seducing or winning all these people on it's side via money. And we were to inform the world about this, all the people who were there and try to get them on our side.

Q. How did you do this?

A. You know after the rally which was done then Kasi Ram Rana, the leader of that place, he was the one who stated that all that is happening is incorrect or not right and is not good. And that was the day itself it was decided that on the 22nd a big meeting was to be held and to inform the people in such a way that somehow another election is held.

Q. And when was the big meeting?

A. 22nd of September.

Q. And where was this meeting held?

A. In Surat.

Q. Where in Surat?

A. There's a big place over there and everybody had gathered over there.

Q. Okay, did anybody speak?

A. (Interpreter) I'm sorry.

Q. Did anybody speak?

[49] A. With the assistance of Kasi Ram Rana, you know, we had called a very very senior of that place, Vajju Vahi.

Q. If we're talking about Ram Rana it's K-A-S-I.

JUDGE TO MR. HILTS

Q. No it's a different name, counsel.

A. Okay.

Q. We've already spelled Ram Rana he said that in the first part of his answer.

A. I apologize, okay.

MR. HILTS TO MR. PATEL

Q. So what happened at that meeting?

A. There was the gathering, the gathering was very big, you know, 2 to 3,000 people and that was very good for us that the attendance was so huge. And then the leader was also very pleased (indiscernible) the gathering and over there he informed that all what had happened was not proper and what the Congress party had done was not good and right.

Q. So how active were you in this meeting on September 22nd?

A. You see it's trying to get the gathering there, telling, informing the people that there is a meeting going to be held and we are going to be informed about very many aspects of things happening and so you please come even our senior leader will be there and he will be speaking also. And you know helping/ assisting that leader over there to, actually it was a [50] very good feeling.

Q. Did you know any of the main party members?

A. Yeah because of me being a leader of the youth, youthful people guys there I had to the privilege of meeting Shankar Singh Vaghella also.

Q. Is that the leader who switched?

A. Yes.

Q. Where did you meet him at?

JUDGE TO MR. HILTS

Q. He said something that was not translated.

A. I'm sorry.

MR. PATEL TO MR. HILT

Q. When he was with BJP party, Bhartiya Janata party that time.

A. Did you ever meet Kasi Ram Rana?

Q. Yes we had a good acquaintance with him.

A. So how many times have you met him?

Q. Whenever any project was to be undertaken which was big in nature he would come and tell us what to do, how to do.

A. And what was his role within the city of Surat?

Q. He was the leader of Surat.

A. Did he have any elected position?

Q. He was a leader on behalf of Bhartiya Janata party from their itself.

[51] A. Now this meeting on September 22, 1996 were there any problems?

Q. No there was no problem in the meeting. Meeting was a great success. It was after the meeting that problems started.

A. When did the problems start?

Q. When Congress party found out that all what we had done and they did not like it. And Shankar Singh Vaghella also found out what we had done in Surat and it was not good for him. So they informed their people who were there in that vicinity that all that is happening is wrong and upon their saying the police started arresting people and then you know they went after the youth. And since I was a leader of those youthful crew I was also arrested.

A. Who arrested you?

Q. Police.

A. What was your understanding why they arrested you?

Q. You see I was a youthful guy there and they knew that all what had happened over there was against them and that I should not have campaigned against them and for these reasons itself they arrested me.

JUDGE TO MR. HILTS

Q. Counsel, in his attachment two he says that he's been waiting for a change of government in Gujarat from that of one led by opposition Congress

party I invite you to ask him [52] who's in charge today if he continued to follow politics there?

* * *

[54] Q. When did you leave India?

A. 5th of October 1996.

Q. And who's passport did you use?

A. Someone else's Grupa (phonetic sp.) Singh.

Q. And how did you get this passport?

A. Father arranged all of this for me.

Q. And where did you go?

A. London.

Q. London, United Kingdom?

A. Yes.

Q. And how long did you stay there?

A. Three months.

* * *

[56] Q. Okay, what document did you use to get into the United States?

A. Someone else's passport. Abdullah Bodhaniya.

Q. How did you get that passport?

A. Father arranged everything.

Q. Were you arrested in England?

A. Yes.

Q. And how much time did you spend incarcerated.

A. Maybe 10 to 12 days.

Q. And did you see a Judge?

A. As far as I remember yes.

Q. And were you convicted of anything?

A. I do not know what happened I was not very clear of what was going on there but since it was some else's passport so possibly.

* * *

[57] Q. Good morning, Mr. Patel. I'd like to ask you some questions about the time that you were detained? How did your arrest come about?

A. After the meeting, you know, we were all sitting down together and the police came and arrested us and took us.

* * *

[58] A. I was the leader so I was the only one arrested.

* * *

Q. How were you treated during your detention?

A. They really treat you very badly there.

* * *

[59] Q. And when were you beaten?

[60] A. Same day in the evening.

Q. And how did they beat you?

A. You know with their wooden stick and with their hands.

Q. And how many people beat you?

A. Two people.

* * *

[61] Q. And did I understand you to say you received stitches in your foot?

A. Yes.

Q. And was this while you were in custody or did you receive the stitches after you were released?

A. After release.

* * *

[63] Q. Now you weren't very specific about this criminal conviction that you had in the United Kingdom, what were you arrested for and when?

A. It happened prior to my coming to the U.S. I do not have any document or any evidence to show precisely what date it happened. And me traveling on another passport was the reason why I was caught.

Q. So were you arrested in London based on the passport that you used to come from India to the U.K.?

A. No, from U.K and attempt from U.K. to U.S.

Q. How were you arrested?

A. They found out that this passport is not proper.

Q. Who is they and when did they find out?

A. The police.

Q. And how were you arrested?

A. They took me aside and they said this is not your passport and we are going to arrest you.

Q. Where?

A. At the airport.

Q. So were you on your way from the airport in London to the United States?

A. Yes.

[64] Q. And this occurred before you actually came to the United States in 1996?

A. Yes.

Q. So you had made a previous attempt to come to the United States using someone else's passport?

A. That's right.

Q. How long before you actually came to the United States did this arrest occur?

A. As far as I can remember it was a month a month and a half prior to my coming here. I do not remember the exact date.

Q. So you were arrested at the airport and you were jailed?

A. Yes.

Q. Now you said you didn't really understand what was going on, why was that?

A. You see they took me to jail and then when they took me in front of the judge then I did not know what were they exactly accusing me or what charges were being filed against me. That I did not know.

Q. Did you need an interpreter at that time?

A. Yes, but I did not have any and therefore I did not know exactly what was going on.

* * *

[71] A. Now sir according to the Department of State Country Report the BJP is leading the government of India as well as the state government in Gujarat. Now when the Judge asked you that before you didn't appear to have much information on that. Have you followed politics in India in the seven years you've been living in the United States?

Q. Not much, mostly no.

A. Do you know if your father is still involved with the BJP in Gujarat?

Q. Not as much as before.

A. And why is that, if you know?

Q. Fear is there because of fear. Fear less something may happen to our house.

A. Even though your father's party is now in power both at the state level and the national level?

Q. The party which is not in power is also a powerful party and is equally powerful and can do things with assistance of money.

* * *

[73] Q. What would happen to you today in India if you were to go back?

A. You see if I go back and if they discover that I have come back then maybe they will kill me and also there will be a lot of other difficulties for I have come back in spite of them saying not to come back.

Q. Who would kill you, sir?

A. The other party.

Q. What other party, sir?

A. Congress.

Q. When did the Congress party loose control in your state?

A. As far as I can remember in 1996 I believe it happened when BJP came into power.

Q. So since 1996 BJP has been controlling the state of Gujarat?

A. That I do not know if it has been continually in power. But I do know that most of the time it has been in power.

* * *

[74] Q. Why in your application do you say that they do not grant asylum to people from India in England?

A. When I came over there I came across a handful of Hindus and I talked to them about this and they all said no we do not have such a thing existing over here. And they seemed to be good people and I believed them.

* * *

[75] Q. Sir, I want to know if this statement in your application is a lie? In your application you write, "I have been waiting for a change of government in Gujarat from that of one led by opposition Congress party so that I can go back to my country, but unfortunately it has not happened".

A. No this is true the Congress party is there but I have this fear that if I go back there this may happen with me.

Q. But there has been a change of government, you said there was.

A. Even though the government has changed the people are so powerful the have so much power in them that they can still do anything and everything.

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SUBJECT: PATEL, HINAL

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Regards,

/s/ Patrick McCreary
Patrick McCreary

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